

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ESTATE OF JAMES FRANKLIN PERRY)	
by NATHANIAL CADE, JR.,)	
Special Administrator, and)	
JFP, Jr.,)	
)	
Plaintiffs,)	Case No. 12-CV-664
)	
vs.)	
)	
CHERYL WENZEL, et al.,)	March 12, 2019
)	8:30 a.m.
Defendants.)	

TRANSCRIPT OF PRETRIAL HEARING

BEFORE THE HONORABLE J. P. STADTMUELLER

UNITED STATES DISTRICT JUDGE

Official Court Reporter:
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Proceedings reported by stenotype.
Transcript produced by computer-aided transcription.

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1 THE CLERK: The Court calls *The Estate of James*
2 *Franklin Perry, et al., vs. Cheryl Wenzel, et al.*, Case No.
3 12-CV-664, for a final pretrial conference.

4 May I have appearances beginning with the
5 plaintiffs, please?

6 MR. GENDE: Good morning, Your Honor. James Gende
7 and Chris Katers for the plaintiffs.

8 MS. LAPPEN: Good morning, Your Honor. Assistant
9 City Attorney Sue Lappen appears on behalf of the City of
10 Milwaukee, defendants.

11 THE COURT: Thank you. Good morning, Mr. Katers
12 and Mr. Gende, and good morning to you, Ms. Lappen.

13 As Ms. Maternowski noted, this matter is once
14 again before the Court this morning for a final pretrial
15 conference following up on a similar conference that we held
16 June 26th of last year.

17 The Court has had an opportunity to review your
18 updated submissions, and at the outset I'm going to
19 reincorporate all the comments that I made back on
20 June 26th of last year.

21 First of all, this case will go to the jury on the
22 basis of a Fourth Amendment iteration of the standard to be
23 applied; namely, what is both reasonable and appropriate in
24 terms of medical care.

25 We have been through this multiple times. I

1 appreciate the City, but like an Eighth or a 14th
2 Amendment standard, objective reasonableness under the
3 Fourth Amendment is the current standard in the Seventh
4 Circuit. If there be any change, it will have to come from
5 the circuit, not from Judge Stadtmueller.

6 With regard to expert witnesses, the comments that
7 I made, soon to be a year ago, still hold.

8 If there is any expert testimony at all in this
9 case, whether it be from Former Chief Flynn, Michelle
10 Sandry, Robert Prevot, Rachel Waldron, Christopher Poulos,
11 James MacGillis, Chad Zawitz, or Jeffrey Breall, it's going
12 to be extremely limited, and the Court will be prepared to
13 rule as to each of these witnesses in the context of the
14 facts that are before the jury at such time as any of these
15 individual witnesses are proffered.

16 With respect to Mr. Perry, Jr.'s, claim for loss
17 of companionship, I don't believe that's an issue in the
18 case any longer, if it ever was. First of all, there was a
19 request in the -- for the loss of companionship, it was
20 never pled. All state law claims have been dismissed in
21 this case consistent with the Court's order at docket number
22 300 entered on July 28th of last year; thus, I don't
23 believe any testimony from either Mr. Perry, Jr., or
24 Anglia Garner will be necessary.

25 Again, I've not ruled formally this morning, but

1 at least you need to know what the Court's thinking is.

2 With regard to the trial itself, we have no other
3 trial starting on March 25th, so we have clear sailing.

4 We'll start in the morning with selecting a jury
5 of seven. There are no other cases scheduled that week,
6 which means that if this case is settled after noon on
7 Thursday of next week, the parties will jointly be
8 responsible for the cost of bringing in a jury panel, which
9 can run anywhere from \$2,400 all the way up to \$2,800 to
10 \$2,900 depending on what the individual juror mileage is.
11 So keep that in mind as you move forward next week.

12 The Court will conduct the voir dire. We'll
13 select seven jurors. Each side will be entitled to three
14 strikes. The plaintiff exercises its first followed by the
15 Defense exercising its first, and then we move to two and
16 three, meaning plaintiff has the first strike and the
17 Defense has the last.

18 Jurors will be permitted to take notes during the
19 trial. Each side will be afforded 10 to 12 minutes for
20 opening statements. Closing arguments are limited to 30
21 minutes. If the plaintiff intends to offer a rebuttal, you
22 must reserve time to do so as a part of your opening.

23 As the Court indicated last year, all of the
24 exhibits in this branch of the Court are presented
25 electronically. If you need a tutorial on interfacing your

1 computers, we have our Sony OLED screens. You can contact
2 Mr. Eric Riedjik, R-I-E-D-J-I-K, who is on our IT staff. He
3 may be reached at (414) 297-1210.

4 In terms of our trial days, we'll be in session
5 from 8:30 to 10:30; break mid-morning for 15 minutes. We'll
6 go from 10:45 until 12:45; 45 minutes break for lunch.
7 We'll resume at 1:30, go until 3:30. Again, 15-minute break
8 at 3:30. Then we'll be in session from 3:45 until 5:45.

9 The Court is currently working on a set of jury
10 instructions. They will be available for counsel in draft
11 form a week from tomorrow, March 20th, and I would
12 appreciate your collaborating on them between that and the
13 beginning of the trial since the Court's jury instruction
14 conferences are not terribly long since counsel will have
15 benefit of the Court's thinking on the jury instructions
16 well before the case starts.

17 So against that backdrop, are there any other
18 matters that you, Mr. Gende or Mr. Katers, wish to address
19 this morning?

20 MR. GENDE: Thank you, Your Honor.

21 As the Court may be aware, we have resolved a
22 portion of the case with the County. We are expecting a
23 stipulation from them in short order, which will be
24 submitted to the Court for its review and signature, if the
25 Court so desires.

1 Thank you, Judge.

2 THE COURT: Surely.

3 In that regard, Mr. Katers, I would ask that you
4 and Ms. Lappen collaborate to a new case caption, assuming
5 that stipulation is filed and ordered so that the jury
6 understands which defendants are before it.

7 MR. GENDE: Yes, Your Honor.

8 THE COURT: We'll clear all of those cobwebs out.

9 Ms. Lappen, anything more you would like to
10 address this morning?

11 MS. LAPPEN: Just a few administrative matters,
12 Your Honor. We would like to move boxes and get set up as
13 best we can on Friday before.

14 THE COURT: Certainly.

15 MS. LAPPEN: Who will be the point person with the
16 Court staff that we should contact to make those
17 arrangements?

18 THE COURT: You can contact Ms. Maternowski in our
19 chambers.

20 You will be in Room 422. The plaintiffs will be
21 in Room 426. Both of those rooms are across the hall. Each
22 side will have their own witness room, conference room. So
23 your witnesses can wait there.

24 MS. LAPPEN: And, Your Honor, just to coordinate.
25 I have 11 defendants in this matter, and many will be here

1 for at least three or four days of the trial given that some
2 have been subpoenaed by plaintiffs. We'll be presenting
3 others as well. So would the Court prefer that I have them
4 sit this side of the rail, or can we use the front row
5 behind the rail?

6 THE COURT: However you would like to do it.
7 Typically, those that are testifying are seated at counsel
8 table that day; otherwise, they're seated behind the rail.

9 MS. LAPPEN: Okay. Your Honor, with regard to the
10 motions in limine, aside from those motions that relate to
11 expert testimony and the society and companionship claim,
12 there were a couple of motions that I would appreciate some
13 direction from the Court.

14 One was -- I think now it's numbered Defense
15 motion in limine No. 10. That has to do with the
16 disciplinary investigation regarding former Lieutenant
17 Robbins. Plaintiff's counsel had stipulated that they would
18 not present evidence relative to other disciplinary matters
19 regarding other defendants or other police personnel. The
20 one item that we had a difference of opinion on was that
21 investigatory matter involving Lieutenant Robbins.
22 Specifically, there was an investigation that stemmed from a
23 comment that Lieutenant Robbins was heard making on the
24 hallway video camera that captured some of Mr. Perry's
25 movement that night. While the statement is certainly part

1 of the factual background for the case, it's our position
2 that this investigation that followed, and ultimately the
3 discipline against Lieutenant Robbins, is not relevant to
4 the case at hand. In addition, even if it were relevant,
5 that information would be unduly prejudicial and unfair to
6 Mr. Robbins as a defendant in this case. So we ask that the
7 Court rule that evidence regarding that investigatory matter
8 not be presented to the jury.

9 THE COURT: Well, first of all, the statement
10 itself can come before the jury. It's fact.

11 MS. LAPPEN: Right.

12 THE COURT: I don't believe, without getting into
13 the weeds, that there's anything in the investigation
14 including the result that is germane to any of the issues in
15 this case; that is, whether or not Mr. Perry was accorded
16 medical care given the totality of the facts and
17 circumstances under the standard that the jury will be
18 called upon to make that determination.

19 If the plaintiff has a different view, we'll take
20 it up before the trial.

21 MS. LAPPEN: Thank you, Your Honor.

22 And, Your Honor, there were just a couple of other
23 matters that were not expert related. One was really a
24 legal matter relative to the Seventh Circuit's decision in
25 this case. We had filed what I believe is now numbered

1 Defense motion in limine No. 14, and that relates to the
2 Seventh Circuit decision, and it was the City defendant's
3 read that suggested that the Seventh Circuit ruled that the
4 officers could not be held liable relative to
5 medical-related issues at the CJF. And in conjunction with
6 that, the Seventh Circuit had dismissed all of the sheriff's
7 personnel from this action; also had dismissed Officer Bell,
8 who is a Milwaukee police officer who was present as a
9 liaison officer for the CJF. The claims against him were
10 dismissed.

11 And there was language in the decision that
12 suggested that Officers Salinsky and Lopez could only be
13 held liable relative to their actions up to the point in
14 time that they arrived at the CJF. And opposing counsel
15 felt that there was contra language, or opposing language in
16 the Seventh Circuit decision, and so we sought the Court's
17 guidance regarding that.

18 THE COURT: Well, the Seventh Circuit's decision
19 speaks for itself in terms of what they found, but we're
20 beyond the legal arguments here. And, factually, I'm not
21 going to stand in plaintiff's way if there are some facts
22 that suggest that the Seventh Circuit got it wrong. So
23 we're just going to have to see what the testimony is during
24 the trial.

25 I'm not going to be so clairvoyant as to forecast

1 this morning without everything being in context what the
2 appropriate decision ought to be.

3 I appreciate your raising it once again, but I'm
4 not in a position on the state of the record before me today
5 to tell you one way or the other.

6 MS. LAPPEN: And, your Honor, there were just two
7 other issues -- and I raise these concerns just in
8 anticipation of opening statements and so forth.

9 Defense motion in limine No. 15 had to do with
10 photographs of Mr. Perry after death, and we sought
11 preclusion of those photographs, and plaintiffs could not --
12 we could not come to an agreement regarding that issue.

13 The other matter is Defense motion in limine
14 No. 16, and that relates to the destruction of the spit mask
15 that was worn by Mr. Perry back in 2010, and I think it was
16 amply briefed. There's several affidavits explaining what
17 happened with regard to that. It was something that
18 occurred without any knowledge by myself, my office, or the
19 defendants. It had to do with a new computer programming
20 system that they had with the property control section.

21 In any event, we seek guidance relative to those
22 two issues as well in anticipation for the opening
23 statements.

24 THE COURT: Well, as to the spit mask, the fact
25 that it's no longer available certainly can be communicated

1 to the jury, whether by stipulation or otherwise. But
2 beyond the fact of it no longer being available only to no
3 action by anyone associated with the litigation, I don't
4 think one can draw any efforts, inferences, fact.

5 With regard to the photographs, generally
6 speaking, even though they may be difficult for jurors to
7 accept our view, they don't have to look at them. And if
8 they're troubled by those photographs, some jurors will not
9 even look at them, and some jurors take offense because it's
10 gilding the lily as it were. So things like this cut both
11 ways.

12 The better course is, of course, to present the
13 facts without having to get into the photographs unless
14 there's some particularized need that the photos would show
15 something that testimony could not capture. So we'll
16 address it.

17 When it comes to opening statements, the rule in
18 this branch of the Court, if counsel, whether the plaintiff
19 or the Defense, have a good faith basis to believe that some
20 item of evidence will ultimately come before the jury,
21 they're free to make reference; however, they run the risk
22 that ultimately the evidence may be precluded, and that
23 leaves the fact finder in a lurch about why did they tell me
24 about this, and then it never came before us. So it's
25 walking a bit of a tight rope when it comes to matters that

1 may not come before the jury. So keep all of that in mind.
2 More than that, I cannot say.

3 Anything further?

4 Now, in terms of a timeline, based on where you
5 are with your preparations, is there any thought we might
6 finish the case the week of the 25th, or is it likely to
7 go over?

8 MR. GENDE: Your Honor, with the County out of the
9 equation, I think five days -- we're going to push hard to
10 get it done in five days.

11 THE COURT: All right.

12 MR. GENDE: I think it's definitely possible.

13 THE COURT: On Thursday of that week, I think we
14 can do it during our morning break. I have a settlement
15 hearing in a class action involving wages, and typically
16 these take about 15 minutes. So I don't expect it will
17 intrude on the trial. But other than that, I think we are
18 pretty good to go for the entire week.

19 MR. GENDE: Your Honor, one comment on moving
20 through the trial quickly. We did subpoena all the City
21 defendants, and we lined them up in a particular order.

22 In the event that we complete testimony early, I
23 now understand that the defendants will be here, regardless
24 of the time we have subpoenaed them, that should definitely
25 assist in expediting the matter.

1 THE COURT: Sure. Well, in all sincerity, it
2 really works best if you and Ms. Lappen sit down and preview
3 which witnesses, how long you expect the direct to take, how
4 long cross will take so you got a pretty good idea what
5 every day's timeline is going to look like.

6 I appreciate it's an adversarial process, but
7 jurors generally don't like it when lawyers stand up at
8 2:30 in the afternoon and say, "Judge, we've run out of
9 witnesses today."

10 And it always really derives from the lack of
11 communication between lawyers and the witnesses and your
12 respective position. So see if you can home in on that.

13 You know what the Court's schedule is, and we're
14 going to give you a full eight hours in the courtroom. So
15 things tend to move along, and jurors love that.

16 I've been doing this -- June 1st it'll be 32
17 years, and we talk to the jurors after the case -- not about
18 the merits of the case, but things that they like and don't
19 like -- and they hate it when lawyers stand up and
20 continually repeat themselves or bring in four or five
21 witnesses to ask the same questions.

22 They get it. It takes four or five key witnesses,
23 but this is going to take 11? I'm not sure. So you need to
24 focus on that because we hear about it all the time from the
25 jurors. We never talk about the merits of the case. We

1 talk about how we can accommodate them, whether it's
2 parking, whether it's trial day. They love it starting at
3 8:30, and they're here for a full day, and they get
4 something done, and they're permitted to take notes.

5 And they love the technology. When exhibits are
6 up on that OLED screen, and everybody is looking at the same
7 thing all the time, and lawyers aren't fumbling around
8 looking for exhibits in a box under counsel table, and
9 everything is loaded on the computer, you queue it up with
10 the witness, and you move on, and jurors love it.

11 MR. GENDE: I promise, Your Honor, we'll keep it
12 tight.

13 MS. LAPPEN: Your Honor, we've had quite a few
14 discussions. Mr. Katers had indicated that he had believed
15 that the plaintiff's case would take about four days to
16 complete, and so we've planned our witnesses for Friday and
17 Monday. Our only trouble has been coordinating experts, the
18 doctors. So we have two scheduled for Friday afternoon, two
19 scheduled on Monday, and then one Tuesday morning, and that
20 might very well be our last witness.

21 Dr. Brill was unavailable, so we actually are
22 going to take his evidentiary deposition next week. So long
23 story short, we really have been communicating well and have
24 made good strides, I think, in making sure that we're
25 efficient with Court time and the jury's time.

1 THE COURT: Well, the only thing I could ask that
2 both sides do with regard to expert witnesses is take a look
3 at the relevant Rules of Evidence in the Seventh Circuit
4 cases.

5 I know the plaintiff cited a couple of cases in
6 support of witnesses on police training, and that's fine,
7 but if you look at the actual cases, the Seventh Circuit
8 ruled that the testimony was properly excluded.

9 So we need to all hopefully get on the same page,
10 and this case has taken an inordinate amount of everyone's
11 time going all the way back to when it was before
12 Judge Randa.

13 We went through a bit of a streamline process when
14 the case was before Judge Callahan. And I appreciate
15 everybody striving to get to the end of the rope, and it's
16 been a strained process.

17 MR. GENDE: Your Honor, I agree wholeheartedly
18 with judge's recitation; however, this is a very significant
19 case. The Seventh Circuit decision in the Estate of Perry
20 has been cited nearly 35 times in the short time that it's
21 been out there. So as long and tortious a process it has
22 been, there are some significant national issues that have
23 been decided and may be decided at the trial of this matter.

24 THE COURT: Sure. Understood.

25 MR. GENDE: Thank you, Judge.

1 THE COURT: All right. We'll see you Monday
2 morning, March 25th.

3 Again, we will have jury instructions and a
4 verdict next Wednesday afternoon, March 20th. And if you
5 have any suggestions once you see the draft, please feel
6 free to submit suggested changes so that when we get to the
7 end of the trial, we'll have a truly workmanlike product.

8 MS. LAPPEN: Your Honor, one other administrative
9 question. When will the jury pool information be available?

10 THE COURT: It'll be available Thursday,
11 March 21st.

12 And, again, this is the only case scheduled for
13 trial that week. So the panel that will be coming in will
14 be summoned for this case. They don't know the case, but
15 you should know we have a panel coming in, and they will be
16 told that the case may last more than a week, and we may
17 have some issues with jurors because schools are out the
18 week of the 25th and some the week after, the following
19 week.

20 So we're trying to stay ahead of the game so that
21 we have a sufficient pool of jurors from which to select a
22 jury. And if all seven are available at the end, all seven
23 will deliberate.

24 The Court stands in recess for three minutes.

25 (Hearing concluded.)

C E R T I F I C A T E

I, Richard D. Ehrlich, a Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing is a true, complete, and accurate transcript of the proceedings ordered to be transcribed in the above-entitled case before the Honorable J.P. Stadtmueller, in Milwaukee, WI, on March 12, 2019.

s/Richard D. Ehrlich March 21, 2019

Richard D. Ehrlich, Official Court Reporter